[APPELLATE CRIMINAL JURISDICTION]

TERRELL, Ag. C.J. S.S., POYSER, C.J. F.M.S. & GORDON-SMITH, Ag. J.A.

December 7, 1940.

CHEONG SAM v. THE STATE OF BRUNEI.

[BRUNEI MAGISTRATE'S APPEAL No. 114 of 1940]

Brunei Courts Enactment s. 23—Appeal to Supreme Court of Colony—Competence of Appeal—Jurisdiction.

An accused was tried on a capital charge in the Court of the Resident of Brunei, and he was convicted and sentenced to death. He appealed to the Supreme Court of the Colony.

Held, that there is no appeal to the Supreme Court of the Colony from the Court of the Resident of Brunei in the case of a sentence of death.

APPEAL.

R. C. H. Lim for accused.

C. H. Butterfield (Crown Counsel) for the State of Brunei.

The facts and arguments sufficiently appear from the judgment of the Court of Appeal.

Cur. Adv. Vult.

Terrell, Ag. C.J. S.S., Poyser, C.J. F.M.S. & Gordon-Smith, Ag. J.A.—Section 23 of the Brunei Courts Enactment provides that when any person is charged with an offence punishable with death a preliminary inquiry shall be held, and thereafter the record of the proceedings shall be forwarded to the High Commissioner, who may direct that the accused shall be tried:—

(a) in the Court of the Resident; or
(b) by a Judge of the Supreme Court of the Colony sitting in the State; or
(c) by a Judge of the Supreme Court sitting in the Colony.

In the case now before the Court the High Commissioner directed the trial to be in the Court of the Resident.

The accused was duly tried, convicted and sentenced to death.

An appeal was lodged under the provisions of s. 16 of the Brunei Courts Enactment, and s. 302 of the Criminal Procedure Code of the Colony which applies in Brunei by virtue of s. 25 of the Brunei Courts Enactment.

Such appeal was in form a Magistrate's appeal to a single Judge, but the chief Justice directed, under the provisions of s. 306 sub-s. 3 of the Criminal Procedure Code, that the appeal should be heard before three Judges.

When the appeal was called on the Deputy Public Prosecutor, who appeared for the State of Brunei, raised the preliminary objection that the Court had no jurisdiction to entertain the appeal.

It is clear that there is no appeal if the trial is directed to be before a Judge of the Supreme Court either in Brunei or in the Colony, but it is argued that an appeal will lie if the trial has taken place in the Court of the Resident in view of the provisions of s. 16 (i) of the Brunei Courts Enactment which reads as follows:—

> "An appeal shall lie to the Supreme Court sitting within the Colony from any decision of the Court of the Resident in the exercise of its original jurisdiction whereby any person has been convicted and sentenced to not less than two years imprisonment or to a fine of not less than $500.00."

It is argued that the section only refers to sentences of imprisonment and fine, and not to a death penalty, which is a sentence of an entirely different character. On the other hand, if there was no other indication in the Enactment, it might be argued that imprisonment and fine are clearly lesser sentences than a sentence of death, and that the subsection is sufficiently wide to include the right of appeal when the death penalty has been inflicted.

There is, however, a clear indication in s. 24 of the Enactment that an appeal to the Supreme Court in the case of a sentence of death was never contemplated. This section lays down the procedure to be followed after sentence of death has been pronounced, either in the Resident's Court or by a Judge of the Supreme Court.

Section 24 sub-s. 1 provides that after sentence of death has been pronounced by the Court of the Resident, the Resident shall forward the record to the High Commissioner with a report setting out his opinion whether there are any and what reasons why the sentence should or should not be carried out.

Section 24 (ii) gives power to the High Commissioner to confirm the sentence, or commute it, or to pardon the person sentenced.

Section 24 (iii) gives power to the High Commissioner to direct further enquiry to be made, or further evidence to be taken.

It will be seen that the record and report have to be forwarded to the High Commissioner, and there is no provision, as in s. 275 sub-s. (c) (i) of the Criminal Procedure Code, for the record and the report of the trial being forwarded to the appellate Court. The only possible conclusion is that no appeal to the Supreme Court was contemplated.

In the opinion of the Court, therefore, the preliminary objection is well founded and the Court had no jurisdiction to entertain the appeal.

Appeal dismissed.

Solicitors for accused—*R. C. H. Lim & Co.*

END OF STRAITS SETTLEMENTS OFFICIAL REPORTS.

(TRADE MARKS)

HARRISON, REGISTRAR OF TRADE MARKS.

December 19, 1940.

RE APPLICATION BY LI LONG YU & ORS., trading as CHAN LI CHAI.

[TRADE MARK APPLICATION No. 4733 of 1940]

Trade Marks — application for registration — opposition — mark "calculated to deceive" — refusal of application — Trade Marks Ordinance, 1938, Sec. 23 (1).

An application was made by L.L.Y. and two others trading under the firm name of "Chan Li Chai" for the registration of a mark consisting of a red label upon which appeared certain Chinese characters arranged in two perpendicular columns. The translation of the Chinese characters was given as "Chan Li Chai" (firm name of proprietors) supervised manufactured product, male deer horn 3 whip liquor." Registration was applied for in Class 5 in respect of medicated wines. The applicants disclaimed the right to exclusive use of the Chinese characters with the exception of the Chinese characters meaning "Three whips." The application was opposed by a Company carrying on business as manufacturers of and dealers in Chinese medicated wines who and whose predecessors in business had used a similar mark in respect of Chinese medicated wines manufactured and/or sold by them for upwards of thirty-two years. The principal grounds of opposition were that the use of the name "Chan Li Chai" as part of the mark sought to be registered was calculated to deceive and that the mark was calculated to lead the applicants' goods being passed off as or mistaken for goods manufactured or sold by the opponents. There was no evidence of any user by the applicants of the words or characters "Chan Li Chai" in connection with Chinese medicated wines within the Colony prior to the date of the application.

Held, without deciding whether the words or characters "Chan Li Chai" were distinctive, that the use of the three characters as part of the mark would be likely to deceive or cause confusion; accordingly, under section 23 (1) of the Trade Marks Ordinance, 1938, the application must be refused.

Cases referred to:—

(1) *Cash v. Cash,* 18 R.P.C. 213.

(2) *Dunhill v. Bartlett & Bickley,* 39 R.P.C. 462.

(3) *Pianotist, Co., Ltd. (in the action for registration)* 23 R.P.C. 774.

(4) *Rodgers,* 41 R.P.C. 291.

(5) *Teofani,* 30 R.P.C. 76.

OPPOSITION under Section 27 of the Trade Marks Ordinance.

Demuth for the Applicants.

Mundell and *Mallal* for the Opponents.

Harrison, Registrar of Trade Marks.—This is an Opposition lodged by Messrs. Tai Thong Wine Traders Limited against the Registration of a Trade Mark in the name of Li Long Yu, Chan Shok Ping and Li Sik Yu, trading as Chan Li Chai. The mark consists of a red label, upon which within a black border are certain Chinese characters also in black, arranged in two perpendicular columns and the application is numbered 4733. The Transliteration of the Chinese characters is given as "Chan Li Chai, Kum Chai, Lok Yong, Sum Pin Chow" and the Translation as "Chan Li Chai (firm name of Proprietors) Supervised manufactured product, male deer horn 3 whip liquor." Registration has been applied for in Class 5 in respect of Medicated Wines, and the mark has been duly advertised in the Government Gazette. The Applicants disclaim the right to the exclusive use of the Chinese characters with the exception of those characters meaning "Three Whips."

The Opponents ask that the application be refused on the grounds that:—

(a) they and their predecessors in business have used for upwards of thirty-two years the words Chan Li Chai, and the Chinese characters equivalent to Chan Li Chai in connection with Chinese Medicated Wines manufactured and/or sold by them, and that the name denotes and has long denoted both to the Trade and the Public goods manufactured and sold by them and their Predecessors in business, and that it distinguishes and has long distinguished such goods from similar goods of other Manufacturers, Traders and Dealers;

(b) that the use of the Name "Chan Li Chai" as part of the mark is calculated to deceive, and

(c) that the mark is calculated to deceive and to lead to the Applicants goods being passed off as or mistaken for goods manufactured or sold by the Opponents.

At the hearing before the Registrar, the Applicants were represented by Mr. Demuth, whilst the Opponents were represented by Mr. Mundell and Mr. Mallal.